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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

Date: FEB 15 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home healthcare business.[1] It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director noted that the United States Citizenship and Immigration Services (USCIS) records indicated the petitioner had filed more than fifty Forms I-140 since May 2007, with twenty seven Form I-140 petitions filed in the priority year. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wages to the beneficiary and all other beneficiaries of recently approved and/or pending Forms I-140 as of their respective priority dates and to the present time. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 23, 2010 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, as well as the wages of the other sponsored beneficiaries currently approved and/or pending Forms I-140.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.[2]

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

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[1] The petitioner described itself as a home health care business. The director in his decision identified the petitioner as a provider of skilled and non-skilled home care, facility staffing, and AIDS case management.

[2] The definitions at 8 C.F.R. § 205.5(l)(2) stipulate that the phrase "other worker" means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature.

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on July 16, 2008. The proffered wage as stated on the ETA Form 9089 is $7.94 per hour ($16,515.20 per year). The ETA Form 9089 states that the position requires no education, no work experience, and no special skills.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On appeal, counsel submits several news articles, including a *Forbes Magazine* online article that notes job possibilities in the healthcare field, including ambulatory care services; a *Los Angeles Times* article, dated October 20, 2005, that notes increasing numbers of foreign nurses and aides working as caregivers in nursing homes; a September 11, 2006 article from the *Daily News* that refers to shortages of workers in the United States; an article entitled "Older Caregivers Help Fill Shortage of Aides," from *The Los Angeles Times*, dated March 3, 2008, that discusses the difficulty of finding younger people to work as caregivers; a newspaper article, dated January 6, 2008, that discusses a growing industry built on helping adult children keep their aging parents safe and independent; and an excerpt from an article entitled "2008 Job Outlook." In this article, home health aides are listed as a fast-growing industry. Counsel also submits a copy of an American Immigration Lawyers Association (AILA) InfoNet article entitled "What Matter of Treasure Craft Really Means."

Other relevant evidence in the record includes the petitioner's Forms 1120, U.S. Corporation Income Tax Returns, for tax years 2007 and 2008,[4] and four lists generated by the petitioner of claimed Form I-140 beneficiaries.[5] The lists identify 41 Form I-140 petitions approved with priority dates in

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] The AAO notes that on appeal, counsel states that the priority date is 2007; however, as stated above, the priority date is July 16, 2008. Thus, the petitioner's tax return for 2007 is not dispositive in this matter. Nevertheless, the AAO will review the earlier return in its examination of the totality of the petitioner's circumstances.

[5] In response to the director's RFE, counsel stated that his law firm no longer handled any Form I-

2005; 25 Form I-140 petitions approved with priority dates in 2007; 26 pending Form I-140 petitions with priority dates of 2008; and three Form I-140 petitions filed and approved for Schedule A nurses in 2008 or 2009. The record also contains copies of the petitioner's Forms 941, Employer's Federal Quarterly Tax Return, for the third quarters of tax years 2008 and 2009. The documents indicate the petitioner paid 133 employees in third quarter 2008 and 113 employees in third quarter 2009. The record further contains a copy of the petitioner's website as of February 20, 2007.

The petitioner submitted a letter, dated November 18, 2008, written by [redacted], the petitioner's manager of non-medical services. [redacted] stated that the petitioner provides private duty care giving services to the community on private pay basis, hiring non-certified caregivers, CAN's and CHHA's to provide companionship, homemaking and assistance with personal care, meal preparation, light housekeeping and transportation. [redacted] stated that it is challenging to find qualified caregivers, which impacts the number of cases the petitioner can accept. She stated that between the months of March 2008 and November 2008, she had to turn down 26 cases due to lack of caregivers. She also stated that the petitioner's rates are $19.50 to $23.00 per hour.

The petitioner also submitted two contracts to the record. The first contract is a Purchase of Services contract, dated November 10, 1999, between the petitioner and the University of California, Davis (UCD), School of Medicine through [redacted] to provide services to frail elderly and functionally impaired UCD clients.

The contract is accompanied by the petitioner's 1999 Rate of Pay Sheet for UCD with job codes and disciplines identified as follows: 3-1 – Certified Nursing Assistant (CNA); 3.7 – Certified Home Health Aide (CHHA); 6.3 – Uncertified Nursing Assistant (NA); 3.3 – Registered Nurse (RN); 3.3 – Licensed Voc. Nurse (LVN); 3.3 – Medical Social Worker (MSW); 3.3 – Physical Therapist (PT); and another job code identified as 3.9 – CNA, CHHA. The rate of pay for NA is $12.00 an hour, for four to twelve hours.

The petitioner's UCD Rate of Pay Sheet for 2009 is also in the record with corresponding job codes and disciplines. According to this document, the rate of pay for an uncertified nurse aid is $22.00 an hour for four to twelve hours. The record contains an amendment to the UCD contract, dated November 18, 2008, that extends the terms of the contract through December 31, 2010, if not terminated earlier. The record also contains the petitioner's MSSP Service Vendor that identifies the following staff titles and number of staff (volunteer and paid), apparently in 1999: RN-1; MSW-1; PT-1; LVN-17; LPT-3; CNA-37; CHHA-11; and NA-52,

The second contract, signed by the petitioner on November 4, 2008, and effective until June 30, 2009, is between [redacted] and the petitioner to provide professional nursing health care staffing services.

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140 petitions approved in 2005 or with priority dates prior to 2007. Thus, counsel could not comment further on the petitioner's ability to pay the proffered wage with regard to these petitions.

The contract includes provisions for criminal background checks for all placements, and the provision of training on blood borne pathogens. At Section 1.2, Background Information: the contract states that "each placement provided by Agency hereunder shall have completed at least one year of recent experience in a similar setting and assignment within three (3) years of providing Services Hereunder." On appeal, the petitioner submitted an amendment to this contract to include the provision of services by both skilled nursing and surgical technician health care professionals and to change the renewal effective date to June 30, 2010

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on January 1, 1991, to have a gross annual income in excess of $3 million dollars, and to currently employ 120 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the ETA Form 9089, which he signed on April 6, 2009, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On appeal, counsel reiterates assertions made in his response to the director's RFE. Counsel notes that given the hourly rates of pay noted in [redacted] letter, the petitioner's ability to pay the proffered wage of $7.62 an hour can be easily met.[6] Counsel states that twenty-four hours of work at $7.62 equals $182.88, which equals $66,751.20 per annum. Counsel asserts that if the forty-eight beneficiaries identified on Lists B and C were employed by the petitioner, their earnings would result in income of more than three million dollars, with more than one million dollars in profit to the petitioner. Counsel states that the petitioner would have no problem meeting its ability to pay based on a corresponding increase in gross receipts, payroll, anticipated future growth, and business climate.

Counsel refers to the petitioner's Form DE-6 as more evidence of the petitioner's ability to pay its employees; however, the AAO does not find any such document in the record.[7]

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[6] The Form ETA 9089 in this case states that the proffered wage is $7.94, not $7.62.

[7] The petitioner submitted federal quarterly tax records on Form 941 for the 3rd of 4th quarters of 2008 and the 3rd quarter of 2009 reflecting payment of wages to 132, 133 and 113 employees, respectively. The records do not reflect whether payment of these wages was to any of the Form I-140 beneficiaries and thus may not be credited to the petitioner in the determination of its ability to pay the beneficiaries wages.

Counsel notes that neither the Yates memo nor the regulations at 8 C.F.R. § 204.5(g)(2) require that the petitioner prove its ability to pay for each and every beneficiary. If this were the case, Congress would have included language since they might have foreseen companies of the petitioner's size filing multiple petitions. Counsel states that there is no basis for the request to establish the ability to pay the proffered wages for multiple beneficiaries in the statutes. Counsel states that the petitioner's ability to pay the proffered wage should be examined under the preponderance of evidence standard, which is "more likely than not."

The AAO notes that, as the director and counsel both affirm, the petitioner filed multiple I-140 petitions. The director notes that the petitioner filed 27 pending petitions in 2008 and 27 pending petitions in 2009. The director utilizing the proffered wages for the current position estimated that the petitioner had to establish the ability to pay $445,910.40 in 2008, and then another $445,910 in 2009.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). Contrary to counsel's assertion on appeal, the regulation at 8 C.F.R. § 204.5(g)(2) supports this analysis. Thus, specifically, the petitioner has to demonstrate that it has established the ability to pay for all the petitions pending, approved, or with its beneficiary's adjustment application pending in all of the years that overlap the timeframe of the current pending petition. The AAO notes that, in the instant matter, the analysis would probably entail more than the 27 I-140 petitions pending in 2008 and 2009, if the pending adjustment applications are also considered.

On appeal, counsel references a recent AILA meeting with USCIS in which USCIS agreed that the size and life-span of a petitioner should be a factor in the ability to pay review. Counsel also references an AILA Liaison Teleconference with the Eastern Service Center on November 16, 1994 that includes observations by the director. Counsel states that these observations included guidelines for examining the petitioner's ability to pay and its totality of circumstances, based on retained earnings, ratio of total current assets to total current liabilities, and depreciation. Counsel states that these guidelines should be applied to the petitioner's circumstances.

Counsel's reliance on the AILA minutes and comments made at an AILA meeting is misplaced. Counsel does not provide a published citation relating to the use of ratio to total current assets to total current liabilities, depreciation, and retained earnings. Further counsel refers to several unpublished AAO decisions as guidance for how to view the petitioner's totality of circumstances. With regard to the unpublished decisions referred to by counsel, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act,

unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also refers to the Yates memo[8] of May and its examination of the ability to pay. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski,* 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.").

Counsel also claims that the petitioner's financial ratio, including the Current Ratio and the Acid-Test Ratio, could be used to determine the petitioner's ability to pay the proffered wage. The AAO does not view counsel's assertion as persuasive. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The current ratio is a financial ratio that measures whether or not a company has enough resources to pay its debts over the next 12 months. It is an indication of a company's liquidity and its ability to meet creditors' demands. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is not a useful piece of information.[9]

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[8] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2),* HQOPRD 90/16.45, (May 4, 2004).

[9] The observation that a particular ratio is high or low depends on the purpose for which the ratio is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. *See Financial Ratio Analysis,* http://www.finpipe.com/equity/finratan.htm (accessed March 28, 2011); *Financial Management, Financial Ratio Analysis,* http://www.zeromillion.com/business/financial/financial-ratio.html (accessed March 28, 2011).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the beneficiary the entire proffered wage as of the 2008 priority date and onward. The petitioner is also obligated to show that in addition to paying the wages of the beneficiary, it had sufficient funds to pay the wages of the additional sponsored beneficiaries of recently approved and/or pending Forms I-140 as of their respective priority dates and to the present time.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of

> funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 24, 2010, with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny the petition (NOID). As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. As the director noted in his decision, the petitioner's net income for 2008 was -$88,214. Thus the petitioner has not established its ability to pay the proffered wage of the beneficiary and the other sponsored beneficiaries with pending or approved I-140 petitions, or pending adjustment applications. Therefore, for the tax year 2008, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2008 were -$192,327. Therefore, for the year 2008 and onward, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage or the wages of the other sponsored beneficiaries with pending or approved I-140 petitions, or pending adjustment applications.

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[10]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage or the proffered wages to the additional sponsored beneficiaries from their respective priority dates through an examination of wages paid, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel refers to financial ratios, and other items such as retained earnings that are not examined by USCIS in its deliberations over the petitioner's ability to pay. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

With regard to the petitioner's totality of circumstances, counsel notes that the petitioner's gross income increased from tax year 2007 to tax year 2008, as did wages and salaries paid. Counsel states that the petitioner has contracts with two large organizations, has been in business for 19 years, and is an organization of great repute and respect. Counsel also asserts that the petitioner has reasonable expectations of its business and profits increasing. Counsel claims that the beneficiary will generate income far more than the proffered wage based on the difference between the petitioner's rate of pay and the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, although counsel refers to the petitioner's longevity and gross receipts in 2007 and 2008, the AAO does not find these two factors to be sufficient to establish the petitioner's ability to pay all the proffered wages discussed previously. Regardless of the difference between the proffered wage and the petitioner's rate of pay received from its clients, the petitioner has numerous additional expenses for each potential employee, such as insurance, immigration fees, employee benefits, and much higher salaries of other office employees, such as the two CPA's noted on the petitioner's Vendor Information sheet. The petitioner would also have to provide employee training, fees for any certifications, another significant expense. Further the AAO as well as the director notes that based on the petitioner's Forms 941 for third quarters of 2008 and 2009, the petitioner's number of employees (and therefore its source of additional funding, per counsel) declined in 2009.

With regard to the petitioner's reputation within the home healthcare industry, the only evidence entered into the record is an excerpt from the petitioner's 2007 website. This excerpt states:

> We also provide non-skilled attendant care for clients that are private pay or who have long-term care insurance, or have qualified for services with [redacted], the MSSP, or another public service program. All employees are screened with Department of Justice fingerprint clearances and drug testing; they must pass a skills test and h(illegible) experience.

The 2007 excerpt suggests that the applicants for the proffered position must have some experience in the position, and be able to pass certain tests. The petitioner's current website (available at [redacted] as of January 31, 2012) on its facility staffing services page, states:

> Our employees go through an extensive screening process which includes:
> - Intensive interview process
> - Reference/Employment checks
> - Drug Screening
> - Criminal & DMV background checks
> - Skills Test
> - Ongoing supervision
> - License Verification
> - Comprehensive Health Screening

This excerpt suggests that the petitioner does require some work experience, some skills, and some mandatory testing for its non-medical caregivers. The AAO notes that the ETA Form 9089, Part H set forth the minimum requirements for the position of caregiver. The proffered position requires no education and no work experience.[11] Item 14 of Part H reflects no specific skills or other

[11] As stated previously, the definition of EB3 classification of unskilled, other worker requires less than two years of work experience. Thus, some work experience can be required with this classification.

requirements. Thus, the labor certification and the petitioner's current statement of requirements for caregivers are in conflict.

With regard to the contracts with [redacted] being evidence of further business growth and profit, the contract between [redacted] and the petitioner is to provide professional nursing health care staffing services and surgical technician health care professionals. The [redacted] contract does not support any employment of unskilled and/or uncertified caregivers as of the 2008 priority date, or any other time. If non-medical uncertified caregivers are provided to [redacted], the contract between this organization and the petitioner also states that all "placements" must have one year of work experience and other requirements.

However, the petitioner's certified ETA Form 9089 does not require any education, work experience, or willingness to take the tests outlined in the [redacted] contract or on its 2012 website. *Matter of Ho,* 19 I&N Dec. 582, 592-592 (BIA 1988) states: "It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies." This discrepancy does not bode well for gauging the petitioner's reputation within the home healthcare industry.

With regard to [redacted], the record is not clear as to which job code, if any, listed on the two documents with rates of pay, is applicable to the proffered position. In addition, although the record indicates that a contract was extended in 2009 until December 2010, the record is not clear whether the petitioner had a contract with [redacted] in tax year 2008, the priority year. Further the record is unclear on whether the petitioner provided [redacted] unskilled caregivers for the frail elderly or functionally impaired adults during the relevant period of time in question through the MSSP program or another funding source.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage and the wages of all the beneficiaries pending approval of their I-140 petitions or adjust of status applications beginning on their respective priority dates.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.